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No. 96-1755 (H)

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

Arthur Calderon, Petitioner

v.

United States District Court,

Eastern District of California, Respondent

Blufford Hayes Jr., Real Party in Interest

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF

APPEALS FOR THE NINTH CIRCUIT

REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should restructure the procedural default doctrine so that a state court's arbitrary application of certain discretionary procedural rules may be deemed adequate and independent to bar federal habeas review.

REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION

Real party in interest Blufford Hayes Jr. (hereinafter "Hayes") respectfully requests that the Court deny the petition for writ of certiorari. Petitioner (hereinafter "State") seeks review of the Court of Appeals' denial of its petition for writ of mandamus, which thereby affirmed the district court's denial of the State's motion to dismiss, on procedural grounds, 32 extra-record habeas corpus claims raised by Hayes.

The opinion of the Court of Appeals denying the petition for writ of mandamus is reported at Calderon v. United States Dist. Court E. Dist. Cal., 103 F.3d 72 (9th Cir. 1996). The Findings and Recommendations of the magistrate judge, and the district court's order adopting these findings, are not reported, but are printed as Appendix C and D to the petition.

STATEMENT OF THE CASE

1. Nature of the Case.

This action involves a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 raising numerous federal constitutional challenges to the conviction and sentence of death

received by Hayes in the Superior Court of the State of California, County of San Joaquin, in 1982.

2. The Course of Proceedings.

Hayes has been sentenced to death following his conviction for one count of first degree murder, with the special circumstance of burglary.[1] Upon affirmance of the conviction and death sentence on direct appeal to the California Supreme Court [People v. Hayes, 802 P.2d 376 (Cal. Sup. Ct. 1990)], Hayes filed a petition for writ of habeas corpus consisting of 61 claims in the United States District Court for the Eastern District of California. Twenty-three of these claims previously were raised in the California Supreme Court during Hayes' automatic appeal or during a first petition for writ of habeas corpus which was decided **prior** to the direct appeal.

The district court dismissed the 38 unexhausted claims, without prejudice, and ordered Hayes to present the claims to the California Supreme Court. Six weeks later, Hayes filed these claims, and five additional claims, in a second petition for writ

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[1] A jury finding of robbery-murder special circumstance was reversed by the California Supreme Court on direct appeal. People v. Hayes, 802 P.2d 376 (Cal. Sup. Ct. 1990).

of habeas corpus in the California Supreme Court.

The California Supreme Court denied Hayes all relief, issuing an order which stated, inter alia:

> All claims are denied on the merits, except claims 3, 6, and 10. In addition, all claims are denied as untimely, except claims 1, 3, 4, 7, 26.5, 31, 32, 40, 41, 42, and 43. (See In re Clark, (1994) (sic) 5 Cal.4th 750, 797; In re Swain (1949) 34 Cal.2d 300, 304.) . . . Claims 6, 8, and 39 are denied on the ground that they could have been, but were not, raised on direct appeal. (In re Dixon (1953) 41 Cal.2d 756.) . . .

Petition for Writ of Certiorari, Appendix B.[2]

Hayes then filed a first amended petition in the district court, which included these 43 newly-exhausted claims. The State moved to dismiss 32 of these claims on the grounds that

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[2] Justice Mosk was "of the opinion the petition should be denied only on the merits."

they were denied by the California Supreme Court on procedural grounds, i.e., as untimely or on the grounds that they could have been raised on direct appeal, thereby barring further federal court review of the claims. On January 22, 1996, the magistrate judge filed his findings and recommendations that the motion should be denied. Petition for Writ of Certiorari, Appendix C. The State filed objections to the findings and recommendations to the district court judge. Notwithstanding these objections, on April 10, 1996, the district court judge filed an order adopting the magistrate judge's findings and recommendations to deny the motion to dismiss. Petition for Writ of Certiorari, Appendix D.

On September 6, 1996, the State filed a petition for writ of mandamus in the Court of Appeals for the Ninth Circuit seeking an order reversing the district court. The Court of Appeals denied the petition. Calderon v. United States Dist. Court E. Dist. Cal., 103 F.3d 72 (9th Cir. 1996).

3. Disposition in the Court Below.

On December 20, 1996, the Court of Appeals for the Ninth Circuit denied the State's petition for writ of mandamus on the grounds that the order of the district court denying the State's motion to dismiss was not clearly erroneous as a matter

of law. The court reasoned that the district court's order holding that the California state rules regarding: (1) the timely filing of habeas corpus petitions in cases arising from judgments of death; and (2) the obligation to raise a claim on direct appeal, were not adequate and independent to bar federal review of constitutional claims.

With respect to the state timeliness policy, the Court of Appeals noted the concession by the California Supreme Court that "'no clear guidelines have emerged in our past cases'" (Calderon v. United States Dist. Court E. Dist. Cal., 103 F.3d 72, 74 (9th Cir. 1996)(quoting In re Clark, 855 P.2d 729, 737 (Cal. Sup. Ct. 1993))), and added that the State's arguments previously have been rejected because California's rule on timeliness was not "'clear, consistently applied, and well-established'", and therefore could not "serve as an adequate and independent state ground sufficient to support a procedural default." Id. at 74-75(quoting Morales v. Calderon, 85 F.3d 1387, 1393 (9th Cir.), cert. denied, __ U.S. __, 117 S. Ct. 500 (1996).

With respect to the rule obligating the petitioner to raise a claim on direct appeal, the Court of Appeals noted the "lack of consensus on the adequacy of the [state rule][] in

foreclosing federal review of state court decisions," and that it could not "say that the district court clearly erred in determining" whether it had been consistently applied. Id. at 75.

On March 19, 1997, the State filed a petition for writ of certiorari, which was placed on this Court's docket on May 2, 1997, seeking review of the decision of the Court of Appeals.

I

THE PETITION NEITHER RAISES AN IMPORTANT QUESTION OF FEDERAL LAW NOR IDENTIFIES A CONFLICT IN THE COURTS BELOW

This petition for writ of certiorari does not involve an important question of federal law which must be resolved by this Court. The State fails to articulate any reason why the Court should depart from the well established precedent that a state procedural rule that is unclear and inconsistently applied lacks due process as an adequate and independent state ground for upholding a judgment. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); Jordan v. De George, 341 U.S. 223, 231-32 (1951); County Court of Ulster County v. Allen, 442 U.S. 140, 150

(1979); Ford v. Georgia, 498 U.S. 411, 422-24 (1991); Calderon v. United States Dist. Court E. Dist. Cal., 96 F.3d 1126 (9th Cir. 1996), cert. denied, __ U.S. __, 137 L. Ed. 2d 714 (1997); Morales v. Calderon, 85 F.3d 1387, 1393 (9th Cir.), cert. denied, __ U.S. __, 117 S. Ct. 500 (1996); Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1175 (1995).

California's habeas corpus timeliness rule and its rule requiring the presentation of claims during direct appeal (hereinafter "Dixon" or "Dixon rule") cannot be equated with the clear and objective rules that have been upheld as adequate and independent. Compare In re Clark, 855 P.2d 729, 759 n.30 (Cal. Sup. Ct. 1993)(state rules regarding timeliness "cannot fairly be analogized to a statute of limitations") with Coleman v. Thompson, 501 U.S. 722 (1991)(strict time period for filing claims); and In re Harris, 855 P.2d 391, 396 (Cal. Sup. Ct. 1993) (acknowledging that previously discretionary "Dixon" rule only *now* is firmly established) with Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989)(claims not raised on direct appeal cannot be raised on post-conviction review). In this regard, no issue set forth in the petition remains unanswered by the Court, and no confusion has occurred with respect to the lower courts'

understanding and application of this adequacy test.

Moreover, there are no conflicts in the courts below with respect to this precedent. Remarkably absent from the State's analysis is that, consistent with the Court of Appeals' decision in this case, every federal circuit has stated in a habeas corpus proceeding that only those state rules that are consistently enforced are adequate to support a finding of procedural default. See Breest v. Perrin, 655 F.2d 1, 3 (1st Cir.), cert. denied, 454 U.S. 1059 (1981); Wedra v. LeFevre, 988 F.2d 334, 340 (2d Cir. 1993); Reynolds v. Ellingsworth, 843 F.2d 712, 719 (3d Cir.), cert. denied, 488 U.S. 960 (1988); Smith v. Dixon, 14 F.3d 956, 972 (4th Cir.), cert. denied, 513 U.S. 841 (1994); Hill v. Black, 932 F.2d 369, 373 (5th Cir. 1991); Warner v. United States, 975 F.2d 1207, 1213 (6th Cir. 1992), cert. denied, 507 U.S. 932 (1993); Rosa v. Peters, 36 F.3d 625, 633 (7th Cir. 1994); Grubbs v. Delo, 948 F.2d 1459, 1463 (8th Cir. 1991), cert. denied, 506 U.S. 835 (1992); Morales v. Calderon, 85 F.3d 1387, 1390 (9th Cir.), cert. denied, ___ U.S. ___, 117 S. Ct. 500 (1996); Klein v. Neal, 45 F.3d 1395, 1398 (10th Cir. 1995); Cochran v. Herring, 43 F.3d 1404, 1408 (11th Cir. 1995). No circuit ever has rejected consistency of application as a test of adequacy. For these reasons, the petition should be denied.

II

THE FACIAL INDETERMINACY OF THE STATE COURT HABEAS PROCEDURAL RULES RENDERS THEM INADEQUATE TO BAR FEDERAL REVIEW

The State's petition is premised upon numerous misconceptions of the law and its disdain for established legal precedent. The State contends that the state court's reference to In re Clark, 855 P.2d 729 (Cal. Sup. Ct. 1993) and In re Dixon, 264 P.2d 513 (Cal. Sup. Ct. 1953) when denying Hayes' habeas claims is "adequate" to support the state-court judgment within the meaning of Harris v. Reed, 489 U.S. 255 (1989), and attempts to shroud the concomitant forfeiture of federal constitutional rights in the garb of federalism. In so doing, the State fails to recognize that comity is not a proscription against federal court review. Due regard for the principles of federalism requires an inquiry into the adequacy and independence of state grounds that threaten to defeat federal jurisdiction. Without contesting the state's power to regulate state procedure, an asserted procedural default that involves only the subjective application of a wholly discretionary and inchoate standard, cannot defeat federal court review.

A. California's Timeliness Rules.

The State's petition is premised upon the misconception that California's "pre-Clark"[3] habeas timeliness rules provided Hayes with adequate notice of a then existing timeliness rule; to wit, that substantial delay in presenting claims must be explained. The State cites the Standards[4] and In re Stankewitz, 708 P.2d 1260 (Cal. Sup. Ct. 1986) in this regard, and concludes that this timeliness rule was "the" rule relied upon by the California Supreme Court when, citing Clark and In re Swain, 209 P.2d 793 (Cal. Sup. Ct. 1949), it found 32 separate claims to be "untimely".[5]

There is no evidence that the California Supreme Court

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[3] In re Clark, 855 P.2d 729 (Cal. Sup. Ct. 1993).

[4] Standards for Preparation and Filing of Habeas Corpus Petitioners Relating to Capital Cases and for Compensation of Counsel in Connection With Those Petitions, adopted June 6, 1989.

[5] In Allen v. Calderon, Case No. CIV-S-88-1123 DFL-JFM-P (E.D. Cal. 1994) (unpublished memorandum), the State conceded before the same district court judge as in this case that, under Siripongs v. Calderon, 35 F.3d 1308 (9th Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1175 (1995), a state court procedural default based upon Stankewitz cannot be used to bar federal review. ("Respondent concedes that the Ninth Circuit has found that . . . the Stankewitz and Horowitz rules [] are not independent and adequate state grounds barring federal courts from reviewing the claims on the merits." Id. at 2.) Speaking now from the other side of its mouth, the State takes the exact opposite position.

relied on Clark, the Standards, or Stankewitz for this proposition. Neither the Standards nor Stankewitz were even cited by the court, and while Clark was cited, and states that: "[o]ur decisions have consistently required that a petitioner explain and justify any substantial delay in presenting a claim" (Clark, 5 Cal. 4th **at 783** [855 P.2d at 750]), the California Supreme Court did not rely upon this proposition, instead citing page **797** [855 P.2d at 760] of its opinion.[6] In fact, the order provides very little guidance or insight as to the reasons for the purported default at all.[7]

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[6] Perhaps the court simply selected a pin point cite from the opinion arbitrarily, or even carelessly, as evidenced in its order here where the court misstates the date of the opinion in its citation as "1994", not 1993.

[7] The lack of explanation by the California Supreme Court principally is the result of its "postcard" denial approach to habeas. See Hunter v. Aispuro, 982 F.2d 344, 347 (9th Cir. 1992), cert. denied, 510 U.S. 887 (1993); Harris v. Superior Court, 500 F.2d 1124, 1125 (9th Cir. 1974) (en banc), cert. denied, 420 U.S. 973 (1975). As a result of this practice, the vast majority of habeas corpus proceedings decided by the California Supreme Court are denied by minute order.

In fiscal year 1991-1992, for example, the California Supreme Court disposed of 1,067 habeas corpus petitions, including 28 relating to death penalty cases. 1994 Annual Report of Judicial Council of California at 77, 81. During that same period, the court published only three opinions in habeas cases challenging convictions, all of which were in death penalty cases, and two of which constituted portions of the direct appeal opinions. See People v. Mayfield, 852 P.2d 331 (Cal. Sup. Ct. 1993), cert. denied, 512 U.S. 1253 (1994); People

While Clark reiterates the timeliness rule referred to by the State, it also sets forth new timeliness standards (see appendix to decision), and attempts to explain and provide uniform guidelines for *future* timely presentation of habeas claims "because no clear guidelines have emerged in our past cases . . . ." Clark, 855 P.2d at 737. Notwithstanding, the State clairvoyantly concludes that the sole basis for the state court's reference to Clark and its untimeliness finding was Hayes' failure to explain any delay in presenting his claims.[8]

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v. Payton, 839 P.2d 1035 (Cal. Sup. Ct. 1992), cert. denied, 510 U.S. 1040 (1994); In re Wilson, 838 P.2d 1222 (Cal. Sup. Ct. 1992), cert. denied, 507 U.S. 1006 (1993).

The minute order denials frequently contain a shorthand reference to various procedural policies, in the form of case citations such as In re Waltreus, 397 P.2d 1001, 1005 (Cal. Sup. Ct.) (issue raised and rejected on appeal), cert. denied, 382 U.S. 853 (1965); In re Dixon, 264 P.2d 513, 515 (Cal. Sup. Ct. 1953) (issue should have been raised on appeal); In re Miller, 112 P.2d 10 (Cal. Sup. Ct. 1941) (issue raised and rejected in prior habeas); In re Swain, 209 P.2d 793, 796 (Cal. Sup. Ct. 1949) (failure to justify delay in bringing petition); In re Stankewitz, 708 P.2d 1260 (Cal. Sup. Ct. 1986) (same), but almost never explain the application of the procedural policy to the procedural facts of the case.

This is attributable to the fact that the court has the power to issue a written opinion only after issuing an order to show cause, which turns the matter into a "cause" within the meaning of Cal. Const. art. VI, § 24. See People v. Pacini, 174 Cal. Rptr. 820, 824 (Cal. Ct. App. 1981).

[8] Hayes in fact provided the following explanation, inter alia, regarding the timing of raising the claims:

Premised upon the foregoing, the State erroneously concludes that Hayes had adequate notice of Clark sufficient to satisfy the notice requirements of Ford v. Georgia, 498 U.S. 411 (1991), i.e., that a state procedural bar must be in place at the time the default occurred to preclude federal review of federal constitutional issues. The purported default did not occur, however, when Clark was announced in July 1993, or when the petition was filed on April 23, 1994 in the California Supreme Court, but at a time prior to Clark, when Hayes purportedly

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> All of the claims set forth in the instant petition were timely raised when this petition was filed with this Court because: (1) the investigation of facts supporting the prima facie elements of the claims commenced within a reasonable amount of time after June 6, 1989, i.e., the date when petitioner became obligated under the standards to conduct an investigation of habeas corpus issues; (2) the discovery of facts supporting the prima facie elements of the claims occurred within a reasonable amount of time prior to the time that the petition was filed; and (3) any passage of time after the discovery of the facts and prior to the filing of the petition was to allow petitioner to complete his investigation on other known issues to enable him to prepare and file the most complete petition possible containing as many claims as became known to petitioner, in lieu of filing piecemeal claims in multiple petitions as the information supporting each claim was gathered.

Petition for Writ of Habeas Corpus at 226.

failed to raise the claims in a timely manner. Accordingly, neither Clark, nor its predecessor cases, nor Standards, constitutes a firmly established, regularly followed, state procedural bar in place at the time the default occurred to preclude federal review of federal constitutional issues.

1. California's Timeliness Rule Prior to Clark.

Ignoring all precedent, the State incorrectly argues that, prior to Clark, California had established, regularly followed timeliness rules. This is legally and factually wrong. Morales v. Calderon, 85 F.3d 1387, 1393 (9th Cir.)("the California Supreme Court's timeliness rule, . . . before its further elucidation in Clark, did not afford an adequate and independent state ground barring federal review . . . ."), cert. denied, __ U.S. __, 117 S. Ct. 500 (1996); Calderon v. United States Dist. Court E. Dist. Cal., 96 F.3d 1126, 1130 (9th Cir. 1996), cert. denied, __ U.S. __, 137 L. Ed. 2d 714 (1997).

While failing to even acknowledge these cases,[9] the

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[9] The State cites Morales only once in its petition, conceding that the Ninth Circuit, like all other circuit courts, requires the petitioner to prove that the state procedural rule is not adequate and independent. While completely ignoring the holding of the case, the State's reference to Morales negates its unsupported position that there is a split of authority with

State then incorrectly claims that Hayes failed to present "empirical" evidence to support the analysis of the Court of Appeals and the district court. Hayes in fact submitted such evidence, which was not rebutted by the State, to the district court in response to the State's objections to the magistrate judge's findings and recommendations.[10] The State's failure to

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respect to that particular issue among the circuit courts.

[10] In this regard, Hayes set forth numerous examples of the state court excusing extraordinary delay while penalizing relative diligence. For instance, Robert Alton Harris' third and penultimate state-court petition for writ of habeas corpus, filed over 11 years post-affirmance, nearly three years after the Standards were in effect, and only five days before his execution, was denied "on the merits," an express rejection of untimeliness. In re (Robert) Harris, No. S026177 (Cal. Apr. 17, 1992)(minute order). There are numerous other striking examples. See, e.g., In re Ghent, No. S031473 (Cal. Feb. 23, 1994)(minute order)(successive habeas petition, filed almost four years after release of Standards and 5½ years after affirmance); In re Heishman, No. S033487 (Cal. Aug. 11, 1993)(minute order)(fourth habeas petition, filed four years after release of Standards and over five years after affirmance); In re Silva, No. S033635 (Cal. July 28, 1993)(minute order)(second habeas petition, filed over four years after release of Standards and over five years after affirmance).

Not merely anecdotal, these examples provide a perspective into a broader problem. Comparing Hayes' case to all other cases involving similar post-affirmance delays (filed after the Standards took effect) yields startling results. At the time Hayes filed his petition in state court, the California Supreme Court had denied 36 post-affirmance petitions involving post-affirmance delays of three years or more (filed after the Standards took effect). More than 50 percent (19) of those cases were denied without any imposition of the timeliness policies. (Case names, numbers, petitions, and the length of passage of

time were all set forth by Hayes). In an additional 28 percent (10) of the cases, at least some of the claims were denied on grounds other than untimeliness. (Case names, numbers, petitions, dispositions, and the length of passage of time were all set forth by Hayes). Only 19 percent (7) of the cases were denied entirely on timeliness grounds.

The statistical analysis should not, and did not, stop there, however, because of the theoretical possibility that the group of all post-affirmance petitions with at least 3 years of post-affirmance delay (filed after the Standards took effect) was too heterogenous a sample for a meaningful single-group analysis. Such a wide grouping could under certain circumstances fail to account for trends within the group. For instance, some measure of evenhandedness could be seen in the existence of a steady increase over time in the percentage of cases held untimely. The aberrant case examples provided should have dispelled any notion of an adequate correlation between the amount of post-affirmance delay and the likelihood of the imposition of a timeliness bar. A more rigorous approach to this question was made, however, by examining the mean and median affirmance-to-filing time span for each subcategory of the group (cases deemed timely, deemed untimely, and deemed timely in part).

The mean affirmance-to-filing time span in the cases deemed timely was 4 years, 6 months; the mean affirmance-to-filing time span in the cases deemed untimely in whole or in part was the same: 4 years, 6 months. The median affirmance-to-filing time span in the cases deemed timely was 3 years, 8 months; the median affirmance-to-filing time span in the cases deemed timely in part and untimely in part was 4 years, 0 months; and the median affirmance-to-filing time span in the cases deemed untimely in their entirety was 3 years, 7 months. Thus, the median affirmance-to-filing time span for the petitions denied as untimely in toto was **less than** the median time span for the cases considered timely in whole or in part. Thus, it was clear that as to these parameters of delay, both the intra-group and the inter-group application of the timeliness rules lacked evenhandedness.

The foregoing empirical observation did not merely reveal minor aberrations from a general trend which could be equated with occasional acts of judicial grace. The empirical data showed quite the contrary; if the vague and seemingly

address this evidence is consistent with its previous disposition of such evidence. See Morales v. Calderon, 85 F.3d 1387, 1391 (9th Cir.)("The State does not dispute these figures . . ."), cert. denied, __ U.S. __, 117 S. Ct. 500 (1996). In this regard, the State's position is wholly unsupported by the record here, its prior conduct, and Ninth Circuit case law.

2. Timeliness Under Clark.

In July 1993, the California Supreme Court conceded the vague and arbitrary application of the its timeliness rule. In re Clark, 855 P.2d 729 (Cal. Sup. Ct. 1993). The Clark court's review of the "law governing collateral attacks on judgments of conviction by petition for writ of habeas corpus" led the court to a simple, but important, conclusion: "no clear guidelines have emerged in our past cases." Id. at 737(emphasis added).

The state court announced substantial revisions to the Standards in July 1993, reprinted as an appendix to the Clark opinion. Id. at 771.[11] Inasmuch as Hayes' defaulted claims were

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flexible policy was indeed a rule, it is honored primarily in the breach.

[11] In addition, the opinion also addressed some of the Standards' most quixotic provisions. For instance, the court gave an example of what might constitute "good cause . . .

investigated, drafted, and filed in the district court on June 22, 1993, i.e., before the Clark decision was rendered, any purported timeliness default had to occur prior to Clark, and Clark (and the amended Standards) ordinarily would be irrelevant to Hayes' case.

This, however, is not the case. Clark acknowledges, consistent with the Court of Appeals' decision here, that prior law contained no clear timeliness requirements. Moreover, the state court's citation to Clark in denying Hayes' claims as untimely, establishes that Hayes' state-court claims were denied on procedural grounds not in existence at the time the purported default occurred.

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showing particular circumstances sufficient to justify substantial delay," id. at 771: petitioner having good reason to believe that other meritorious claims exist and delaying the presentation of known claims in order to avoid piecemeal litigation. The court also provided an important example of what was not good cause: "the assertion of counsel that he or she did not represent the petitioner earlier." Id. at 738 (footnote omitted). The opinion attempted to define the conditions under which a petition failing to demonstrate the absence of substantial delay and the existence of good cause for substantial delay will nonetheless be considered. Id.

3. The State's Misinterpretation of Clark.

In In re Clark, 855 P.2d 729 (Cal. Sup. Ct. 1993), the California Supreme Court acknowledged that with respect to timeliness "no clear guidelines have emerged in our past cases." Id. at 737. The State contends that this statement is irrelevant because it appears in a section of the opinion entitled "Repetitious and piecemeal claims," not in the section entitled "delay."

Initially, it should be noted that the "no clear guidelines" statement appears in a section of the Clark opinion entitled "LIMITATIONS ON HABEAS CORPUS RELIEF" and applies to all state court policies regarding habeas corpus. Moreover, the invalidity of the State's distinction is readily apparent. Although Clark involved potential violations of two state-court habeas corpus policies - the policy against delayed claims and the policy against piecemeal claims, see In re Stankewitz, 708 P.2d 1260 (Cal. Sup. Ct. 1986); In re Horowitz, 203 P.2d 513, 521-22 (Cal. Sup. Ct. 1949); cf. Rules Governing Section 2254 Proceedings in the U.S. District Courts, Rules 9(a) & (b) - delay is inherent in the piecemeal presentation of claims for habeas corpus relief. Indeed, Clark explicitly recognizes that questions of delay and piecemeal presentation are inextricably

bound. See In re Clark, 855 P.2d at 738. Thus, Clark's observations concerning the uncertain legal status of repetitious and piecemeal claims applies to delayed claims a fortiori. Put bluntly, the State's assertion that the California Supreme Court possesses greater latitude to "forgive" the potential violation of two procedural policies than of one, is absurd. There is no sensible reason why inconsistent enforcement of successor petition rules should be prohibited, while inconsistent enforcement of delay rules should be allowed.

Moreover, Clark's assertion, on which the State places great emphasis, that "'[o]ur decisions have consistently required that a petitioner explain and justify any substantial delay in presenting a claim,'" (quoting In re Clark, 855 P.2d at 750), simply begs the question; the decisions never have explained how much delay is substantial or what circumstances constituted adequate justification.

Perhaps understanding that neither the Standards nor case law assisted Hayes in understanding his specific timeliness obligations, the State leans heavily on an aspect of the timeliness rule that was clear: some explanation should have been given. The failure to explain, according to the State, was the "clear" reason why the petition was denied. Hayes, however, did

provide such an explanation. It is therefore impossible for the California Supreme Court to have found the petition untimely on this basis.

4. The Order is Inadequate Under Ford v. Georgia.

Notwithstanding a high degree of ambiguity in the state court's order denying Hayes' application for habeas corpus relief, the court's abstract meaning is relatively plain - someone acting on Hayes' behalf should have done something sooner. In doing so, the court cited In re Clark, 5 Cal. 4th 750, 797 [855 P.2d 729, 760], a decision rendered on July 29, 1993.

The Court has held that a procedural rule invoked by the state does not "even remotely" satisfy the requirement of adequacy and independence unless it was not only "regularly followed" but also "firmly established" by the time at which it is to be applied. Ford v. Georgia, 498 U.S. 411, 424 (1991). In Ford, the state procedural rule was inadequate to foreclose federal court review of a claim of error under Batson v. Kentucky, 476 U.S. 79 (1986), because the rule was not announced until "after petitioner in this case filed his motion on the prosecution's use of peremptory challenges and long after

petitioner's trial was over." Ford, 498 U.S. at 424. "In any given case, however, the sufficiency of such a rule to limit all review of a constitutional claim itself depends upon the timely exercise of the local power to set procedure." Id. at 423. "'Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.'" Id. at 423 (quoting NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58 (1958)).

As in Ford, the California Supreme Court's retroactive application of the timeliness rule announced in Clark raises questions of foreseeability and fairness. In this case, the state court applied Clark retroactively because, at the time Hayes should have raised the claims under Clark, i.e., 90 days within the filing of the reply brief on appeal, Clark was not the law. Hayes' reply brief was filed June 3, 1986. He filed his first state habeas petition that same year. When Hayes filed his first habeas petition, he did so at a time when state law allowed consideration of subsequent petitions for various reasons or no reason at all.

Thus, because the denial of Hayes' claims as "untimely"

involves the retroactive application of a new rule, and Clark was not "firmly established" at the time Hayes should have raised these claims under that decision, the order cannot stand as an adequate and independent state ground under Ford v. Georgia, 498 U.S. 411 (1991) to bar federal review of Hayes' claims.

B. California's "Dixon" Waiver Rule.

The State contends that the Court of Appeals' order presents a further issue of "national importance" in that it does not preclude Hayes from pursuing three claims which were denied by the California Supreme Court as a result of his failure to raise the claims on appeal - the "Dixon"[12] rule violation. Although purportedly a matter of national importance, the State did not even challenge the magistrate judge's findings and recommendations with respect to this issue to the district court judge. Nevertheless, the issue now is raised here.

Citing Dixon in denying these three claims, the state court relied upon a rule that also has not been regularly or consistently applied. Like its pronouncement in Clark with respect to timeliness, "[t]he California Supreme Court recently

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[12] In re Dixon, 264 P.2d 513 (Cal. Sup. Ct. 1953).

held that it would construe and apply the Dixon rule more stringently and consistently in the future, virtually admitting that past precedent had been to the contrary." Odle v. Calderon, 884 F. Supp. 1404, 1413 (N.D. Cal. 1995)(citing In re Harris, 855 P.2d 391 (Cal. Sup. Ct. 1993)). "The court's plan to apply Dixon more strictly as of 1993 cannot pose an effective procedural bar to issues raised in [Hayes'] habeas petition (decided [June 1, 1995]) that were not raised on direct appeal (decided in [1990])." Id. (citing Ford, 498 U.S. at 424-25).

Thus, because the denial of these three claims involves the retroactive application of a new rule; to wit, the pronouncement in In re Harris, 855 P.2d 391 (1993) of the future regular application of Dixon, Dixon was not "firmly established" at the time Hayes should have raised these claims, and the order cannot stand as an adequate and independent state ground under Ford v. Georgia, 498 U.S. 411 (1991) to bar federal review of these claims.

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CONCLUSION

For the foregoing reasons, real party in interest Blufford Hayes Jr. respectfully requests that this Petition for Writ of Certiorari be denied.

Dated: May 30, 1997

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) and not a party to this action; my business address is 1900 Avenue of the Stars, Suite 650, Los Angeles, California 90067.

On May 30, 1997, I served the foregoing document described as REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION on the interested parties in this action by placing [ ] the original [X] a true copy thereof enclosed in a sealed envelope addressed as follows:

William G. Prahl, Esq.
Deputy Attorney General
Office of the Attorney General
1300 I Street, Ste. 125
P.O. Box 944255
Sacramento, California 94244-2550

[X] (By Mail): I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

[ ] (By Mail): As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after deposit for mailing in affidavit.

[ ] (By Personal Service) I caused such envelope to be delivered by hand to the offices of the addressee above.

[ ] (State): I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[X] (Federal): I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on May 30, 1997, at Los Angeles, California.

Cynthia Kelley

CYNTHIA KELLEY